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<b>G.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 14-1793</b>
	)	<b>Issued: January 16, 2015</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>NATIONAL PROTECTION &amp; PROGRAMS</b>	)	
<b>DIRECTORATE, FEDERAL PROTECTION</b>	)	
<b>SERVICE, New York, NY, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

On August 11, 2014 appellant, through his attorney, filed a timely appeal from a June 25, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over merits of this case.

The issue is whether appellant has met his burden of proof to establish that his asthma and sleep apnea are causally related to factors of his federal employment.

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case was previously before the Board. By Order Remanding Case dated February 21, 2014, the Board found that appellant's request for reconsideration received by OWCP on January 24, 2012 constituted a timely request for reconsideration of a February 9, 2011 OWCP decision. The case was remanded for under the proper standard of review.<sup>2</sup> The Board's February 21, 2014 Order Remanding Case is incorporated herein by reference.

The record reflects that on September 10, 2009 appellant, then a 63-year-old security specialist, claimed that he had asbestos-related asthma, and sleep apnea as well as chronic sinusitis and bronchitis as a result of exposure to dust and toxic fumes due to the collapse of World Trade Center. In August 28, 2009 statements, he described how he was exposed to toxins and debris from the terrorist attack and destruction of the two World Trade Center Complex Towers and in the subsequent clean-up. Appellant also provided a list of his current health conditions, which he believed were caused by the dust and toxic fumes in the air. A February 4, 2009 letter from the World Trade Center National Responder Treatment Program, indicates that he has been approved for complete coverage of visits/diagnosis/procedures/treatment/therapy related to chronic respiratory issues, and related symptoms. Numerous physician reports, which contain diagnoses of asthma, acute bronchitis, and heart conditions, were submitted into the record along with diagnostic testing.

In a September 23, 2009 letter, OWCP advised appellant of the deficiencies in his claim and requested that he submit additional factual and medical information, including a comprehensive medical report from his treating physician which provided the physician's opinion along with a well-reasoned medical opinion as to the cause of his medical condition. Appellant was afforded 30 days to submit the requested information.

Appellant provided a response to OWCP's questions and submitted additional medical reports from Dr. Jason A. Shatkin, a Board-certified pulmonologist, concerning his medical conditions. In an October 5, 2009 report, Dr. Shatkin provided an assessment of chronic obstructive pulmonary disease. He opined that appellant's chronic obstructive pulmonary disease and small airways disease may be secondary to exposure to toxins from World Trade Center site.

In a December 3, 2009 letter, OWCP requested that Dr. Shatkin provide a well-reasoned medical opinion on the relationship between the conditions found and appellant's history of exposure to toxic substances at the World Trade Center on September 11, 2001. It noted that, if appellant's conditions were related, then Dr. Shatkin should explain with medical rationale how appellant's conditions were proximately caused, aggravated, accelerated, or precipitated by the reported exposure.

In a December 8, 2009 report, Dr. Shatkin provided an assessment of chronic obstructive pulmonary disease, post nasal drip, and obstructive sleep apnea. He noted that all of appellant's conditions can exist independently; however, considering the timing of the episodes (right after 9/11), there was a high likelihood that they developed as a result of the strong inhalations.

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<sup>2</sup> Docket No. 13-1846 (issued February 21, 2014).

Dr. Shatkin stated that, prior to September 11, 2001, appellant had none of the chronic problems listed including asbestosis, asthma, chronic obstructive pulmonary disease, sleep apnea chronic sinusitis, and bronchitis. He indicated that the prognosis was unknown as this syndrome, resulting from exposure to toxic fumes and or particles from September 11, 2001, was only now evolving. Dr. Shatkin opined that, as all of appellant's conditions are of a pulmonary nature (breathing), they were related to the toxic exposure.

By decision dated January 7, 2010, OWCP denied appellant's claim. It found that, while appellant was exposed to toxins and debris from the site of the September 11, 2001 World Trade Center attack and subsequent cleanup, the medical evidence did not support that the diagnosed conditions of asthma and sleep apnea were causally related to the accepted work factors.

Appellant requested a telephonic hearing before an OWCP hearing representative. Additional evidence submitted included newspaper articles supporting that workers near the World Trade Center were more likely to contract the type of pulmonary diseases from which appellant suffered. In a March 17, 2010 medical report, Dr. Frank P. Pagano, an osteopath, stated that he had treated appellant for many years prior to 2001 and that there was no evidence of any preexisting pulmonary conditions prior to his work exposure on September 11, 2001. He noted that a pulmonary specialist had evaluated appellant in July 1999 for a cough, which later resolved, and testing at that time was completely normal. Dr. Pagano stated that he was in agreement with Dr. Shatkin that, within a reasonable degree of medical certainty, appellant's medical conditions were causally related to his exposure to toxic fumes surrounding the September 11, 2001 events.

By decision dated September 28, 2010, an OWCP hearing representative found the case not in posture for decision as the December 8, 2009 report from Dr. Shatkin and the March 17, 2010 report from Dr. Pagano established a sufficient support for his claim that required further medical development of the medical record by OWCP. He directed OWCP to prepare a statement of accepted facts and refer appellant for a second opinion evaluation by a Board-certified physician in the appropriate specialty.

OWCP prepared a statement of accepted facts as well as a list of questions and referred appellant, along with the case record, to Dr. Lee B. Berman, a Board-certified pulmonologist, for a second opinion examination. In a November 1, 2010 report, Dr. Berman noted the history of injury and diagnosed obstructive sleep apnea due primarily to obesity and not related to exposure at the World Trade Center complex. He noted that appellant has exogenous obesity, which could account for his dyspnea without any intrinsic lung disease. Dr. Berman also diagnosed asthma, as established by a pulmonologist. However, at the time of evaluation, he found no evidence of wheezing or abnormality on his pulmonary function that would allow him to affirm the other pulmonologist's clinical impression. Dr. Berman also noted that appellant's prior spirometry test, included with the records, was normal. He advised, however, that a diagnosis of asthma was not excluded by those observations as asthma may have intermittent symptomatology. Dr. Berman stated that asthma may be acquired at any age and it was likely that appellant would have acquired asthma without exposure on September 11, but he could not discount the possibility. He also noted that appellant's underlying conditions of obesity, hypertension, atherosclerotic heart disease, treatment with beta blockers, may all cause shortness of breath, wheezing, and were all capable of aggravating asthma. In a January 5, 2011 addendum,

Dr. Berman opined that, on a more probable than not basis, “there is a less than 50 percent chance that there is a causal link between [appellant’s] exposure on 9/11 and his reported asthma symptoms.” He found no evidence that appellant has asthma and in any event causal relationship to his exposure on 9/11 has not been established.

By decision dated February 9, 2011, OWCP denied the claim on the grounds the medical evidence was insufficient to establish causal relationship between the diagnosed conditions of asthma and sleep apnea, and the accepted work factors.

In a January 20, 2012 letter, which OWCP received on January 23, 2012, appellant requested reconsideration and submitted additional medical evidence, including a November 2, 2011 blood test report from the World Trade Center Health Program at Mount Sinai, October 31, 2011 blood and urine test results from the Mount Sinai Hospital, and an April 30, 2012 computerized tomography scan of the sinuses, along with letters from appellant to his representative.<sup>3</sup>

In a November 22, 2013 letter to appellant, Dr. John Howard,<sup>4</sup> Administrator, World Trade Center Health Program, explained which conditions were being certified under that program as a result of his World Trade Center exposures as listed in the James Zadroga 9/11 Health and Compensation Act of 2010 (hereinafter the Zadroga Act), 42 C.F.R. § 88.1.

By decision dated June 25, 2014, OWCP denied modification of its February 9, 2011 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>6</sup>

Whether an employee actually sustained an injury in the performance of duty begins with an analysis of whether fact of injury has been established. To establish an occupational disease claim, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;

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<sup>3</sup> As noted above, the Board set aside OWCP’s July 3, 2013 decision, finding that this request for reconsideration was timely filed and remanded the case for an appropriate final decision on appellant’s timely request for reconsideration. Docket No. 13-1846 (issued February 21, 2014).

<sup>4</sup> Dr. Howard’s credentials are not of record.

<sup>5</sup> C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

<sup>6</sup> *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

(2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>7</sup>

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup> The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>9</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>10</sup>

### ANALYSIS

OWCP accepted that appellant was exposed to toxins and debris from the site of the September 11, 2001 World Trade Center collapse and subsequent cleanup. It denied his claim, however, as the medical evidence failed to establish a causal relationship between his exposure to the toxins and debris from September 11, 2001 World Trade Center attack and collapse and subsequent cleanup and his diagnosed conditions of asthma and sleep apnea. On appeal, the Director of OWCP has filed a pleading contending that OWCP's June 25, 2014 was correct and should be affirmed.

Dr. Berman, OWCP's second opinion physician, reviewed appellant's medical history and the statement of accepted facts. He diagnosed appellant with obstructive sleep apnea, which he stated was due to his obesity and not related to his work exposure. Dr. Berman also diagnosed asthma by history, but stated that there was no evidence of asthma on examination or in the prior spirometry results. While he initially stated in his November 1, 2010 report that he could not discount the possibility that the asthma was related to the September 11, 2001 exposure, he could not provide a causal link between appellant's exposure and the asthma in his January 5, 2011 addendum. Dr. Berman's report negates a relationship between appellant's asthma and obstructive sleep apnea conditions with his exposure on and after September 11, 2001.

Dr. Shatkin, in his December 8, 2009 report, and Dr. Pagano, in his March 17, 2010 report, opined that appellant's chronic obstructive pulmonary disease and obstructive sleep apnea were causally related to the event of September 11, 2001 as appellant was asymptomatic prior to

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<sup>7</sup> *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

<sup>8</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>9</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>10</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

the September 11, 2001 work injury. Dr. Shatkin stated that, given the timing of the episodes (right after 9/11), there was a high likelihood that appellant's chronic conditions developed as a result of the strong inhalations and that prior to September 11, 2001 appellant did not have any of the chronic problems listed including asbestosis, asthma, chronic obstructive pulmonary disease, sleep apnea chronic sinusitis, and bronchitis. Dr. Pagano stated that he was in agreement with Dr. Shatkin that appellant's medical conditions were causally related to his exposure to toxic fumes surrounding the September 11, 2001 events, and prior to his work exposure on September 11, 2001, there was no evidence of any preexisting pulmonary conditions. The Board has held, however, that when a physician concludes that a condition is causally related to employment because the employee was asymptomatic before the employment injury, the opinion is insufficient, without supporting medical rationale, to establish causal relationship.<sup>11</sup> The mere fact that a condition manifests itself or worsens during a period of federal employment raises no inference of causal relationship between the two.<sup>12</sup> Neither physician explained how appellant's exposure to toxins and debris from the collapse of the World Trade Center caused or aggravated his medical conditions or any preexisting medical condition.

The November 22, 2013 letter from Dr. Howard indicates the acceptance of several conditions as being certified under the World Trade Center Health Program in accordance with the Zadroga Act. In general, the findings of other administrative agencies with regard to causation are not the equivalent of how the term causation is applied by FECA. To establish a compensable case under FECA, the medical opinion evidence of a qualified physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>13</sup> The letter from Dr. Howard provides no medical rationale as to how the conditions under the Zadroga Act were the significant factor in aggravating, causing or contributing to appellant's diagnosed conditions of asthma and sleep apnea. Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof.<sup>14</sup> The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.<sup>15</sup> Dr. Howard's report does not meet that standard and is therefore insufficient to meet appellant's burden of proof.<sup>16</sup>

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<sup>11</sup> *Thomas D. Petrylak*, 39 ECAB 276 (1987).

<sup>12</sup> *Steven R. Piper*, 39 ECAB 312 (1987).

<sup>13</sup> *Supra* note 8.

<sup>14</sup> *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

<sup>15</sup> *See Lee R. Haywood*, 48 ECAB 145 (1996).

<sup>16</sup> *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

Appellant's statements regarding causation are immaterial as causal relationship is a medical issue which can only be addressed by medical opinion evidence. The numerous diagnostic studies and tests submitted by appellant are not probative on the issue of causal relationship, as medical reports which do not offer any opinion regarding the cause of an employee's condition are of limited probative value on the issue of causal relationship.<sup>17</sup>

The Board finds that the medical evidence does not establish that appellant sustained a medical condition causally related to his federal employment. An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment, is sufficient to establish causal relationship.<sup>18</sup> Causal relationships must be established by rationalized medical opinion evidence. As noted, the medical evidence is insufficient to establish appellant's claim. Consequently, OWCP properly found that he did not meet his burden of proof in establishing his claim.

On appeal, appellant's counsel argues that OWCP's June 25, 2014 decision is contrary to fact and law. As noted above, the medical evidence does not establish that appellant's diagnosed conditions are causally related to the accepted September 11, 2001 event and aftermath. Reports from appellant's physicians failed to provide sufficient medical rationale based on a complete factual background explaining the reasons why his diagnosed conditions were caused or aggravated by the accepted event. The need for such rationale is particularly important in view of the fact that appellant may have other contributing factors.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he sustained asthma or sleep apnea in the performance of his federal duties.

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<sup>17</sup> *Willie M. Miller*, 53 ECAB 697 (2002).

<sup>18</sup> *Supra* note 10.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board